Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1217

LAWRENCE A. UZZELL and
ROBERT LANE ARRINGTON,
Individually, and upon behalf
of all other similarly situated, et al.,
Petitioners,

v.

WILLIAM C. FRIDAY, Individually,
and as President of the University of
North Carolina, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1-31-80-65

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

LAWRENCE A. UZZELL and
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Individually, and upon behalf
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To: The Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:

The Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 9, 1979.

OPINIONS BELOW

The judgment of the Court of Appeals for the Fourth Circuit entitled "Order" entered on November 9, 1979, is not reported and is printed as Appendix B to this Petition. The opinion of the Court of Appeals for the Fourth Circuit Upon Remand entered on February 2, 1979, is reported at 591 F.2d 997. The Order of the United States Supreme Court, granting certiorari, vacating judgment, and remanding for further proceedings in light of the decision in the *Board of Regents of the University of California v. Bakke*, is reported at 438 U.S. 912, 57 L.Ed. 2d 1158, 98 S.Ct. 3139. The opinion of the Court of Appeals for the Fourth Circuit on Petition of Appellees for a Rehearing en banc entered on July 28, 1977, is reported at 558 F.2d 727. The opinion of the panel of the Court of Appeals for the Fourth Circuit is reported at 547 F.2d 801. The opinion of the District Court for the Middle District of North Carolina is reported at 401 F.Supp. 775. The Petitioners do not seek review of judgments delivered in connection with these opinions, and the same are therefore not appended to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. WHETHER CONGRESS HAS DEPRIVED A SENIOR JUDGE OF THE COURT OF APPEALS OF POWER RETAINED BY HIM UPON HIS RETIREMENT TO SIT *EN BANC* UPON CASES THERETOFORE HEARD ON A-PANEL.

Pursuant to Rule 33(b) of the Rules of the United States Supreme Court, the Petitioner hereby recites that Section 2403(a) of Title 28 of the United States Code may be applicable.

2. WHETHER THE RECALL OF MANDATE AFTER NINE MONTHS AND AFTER THE APPOINTMENT OF TWO NEW JUDGES DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 3, Section 1 of the Constitution of the United States provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Section 5 of Public Law 95-486, 95th Cong. October 20, 1978, 92 Stat. 1629, provides:

> "Section 5. (a) Section 46 (c) of Title 28 of the United States Code is amended—
>
> (1) in the first sentence, by striking out 'division' and inserting 'panel' in lieu thereof; and
>
> (2) by striking out the third sentence."

* * * *

28 U.S.C. 46(c), before October 20, 1978, provided:

> "(c) Cases and controversies shall be heard and determined by a Court or division of not more than three judges, unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court *en banc* shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court *en banc* in the rehearing of a case or controversy if he sat in the court of division at the original hearing thereof."

STATEMENT OF THE CASE

On June 15, 1974, this action was commenced in the United States District Court for the Middle District of North Carolina seeking to nullify certain University practices as being racially discriminatory and in violation of the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. 1983, and the Civil Rights Act of 1964, Title VI, 42 U.S.C. 2000d. Thereafter, the District Court granted the Respondents' motion for summary judgment. 401 F. Supp. 775.

The Petitioners appealed. On January 5, 1977, the Court of Appeals for the Fourth Circuit, in a panel consisting of Bryan, Senior Circuit Judge, Widener, Circuit Judge, and Kunzig, Judge, United States Court of Claims, sitting by designation, affirmed summary judgment in favor of the Respondents in part, but reversed the summary judgment ruling and remanded with directions that the District Court enter summary judgment for the Petitioners on two issues. 547 F.2d 801. Respondents moved for rehearing, which was denied on February 28, 1977.

On February 11, 1977, mandate issued, but was recalled *sua sponte* on March 21, 1977. Petitioners moved to vacate the order of recall on May 26, 1977, but no explicit ruling on this motion was entered.

Upon rehearing *en banc* before Circuit Judges Haynsworth, Winter, Butzner, Russell, Widener, Hall and Senior Circuit Judge Bryan, an order was entered affirming the decision of the panel subject to certain additions. Judges Winter, Haynsworth and Butzner dissented. 558 F.2d 727.

The Respondents filed a Petition for a Writ of Certiorari, which was granted on July 3, 1978, the judgment of the court *en banc* vacated, and the action remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Regents of the University of California v. Bakke*. 438 U.S. 912.

On July 20, 1978, the Petitioners filed a Motion before the Court of Appeals to expedite the briefing and oral argument upon remand.

On October 20, 1978, Congress enacted Public Law 95-486.

On October 27, 1978, argument before the court *en banc* on remand was scheduled for November 16, 1978, before the same judges who had previously heard the case: Haynsworth, Winter, Butzner, Russell, Widener, Hall and Bryan. Judge Phillips, former Dean of the UNC Law School, recently appointed to fill the vacancy caused by the death of Judge Craven, declined to sit. The decision of the panel and the full court theretofore rendered was reaffirmed. Judges Haynsworth, Winter and Butzner dissented. This opinion was issued on February 2, 1979. 591 F.2d 997. Mandate was not stayed, and no Petition for a Writ of Certiorari was filed.

On May 31, 1979, after the expiration of all deadlines for review, the letter of the court, hereto attached as Appendix A, was sent. Responses were filed by the Respondents on June 4; and June 6, 1979 and by the Petitioners on June 8, 1979. The Petitioners raised the question of the validity of Public Law 95-486 in their response.

On July 27, 1979, Judge Murnaghan was commissioned, and on September 13, 1979, Judge Sprouse was commissioned.

On November 9, 1979, mandate was recalled, the decision of February 2, 1979, was withdrawn, and the matter ordered rescheduled for hearing. This decision was rendered by Judges Winter, with the concurrence of Judges Haynsworth, Butzner, Murnaghan and Sprouse. Judges Russell, Widener and Hall dissented. Judge Phillips took no part in the consideration of the order. Judge Bryan was not mentioned.

REASONS FOR GRANTING THE WRIT

1. The question of whether Congress has the power to deprive a Senior or Regular Active Judge of the Court of Appeals of the power to sit *en banc* should be settled by this Court.

2. The question whether Congress may deprive a Senior Judge of the Court of Appeals, of the power to sit *en banc* upon cases pending before the *en banc* court on October 20, 1978, should be settled by this Court.

3. The United States Court of Appeals for the Fourth Circuit substantially rejected the doctrine of the finality of decisions, thereby departing from the accepted and usual course of judicial proceedings and necessitating the supervision of this Court.

I.

The Honorable Albert V. Bryan was appointed a Judge of the United States Court of Appeals for the Fourth Circuit on August 15, 1961. At the time of his appointment, a senior judge who sat on a panel was not entitled or authorized to sit *en banc* pursuant to Section 46(c) of Title 28 of the United States Code. *United States v. American-Foreign Steamship Corp.*, 363 U.S. 685, (1960). On November 13, 1963, Congress reversed this decision of the Supreme Court, and added the third sentence to Section 46(c) to clarify the status of Senior Judges. Public Law 88-176. 1963 U. S. Code News at 1105.

There is no issue here concerning the jurisdiction of the court. Without question, Congress may increase and decrease the jurisdiction of the federal courts without affecting the tenure of office of the judges of that court. It has done so several times. *E.g.*, Act of March 3, 1875, Section 2 (28 U.S.C. 1331); Act of March 3, 1911, c. 231; Section 24 (28 U.S.C. 1337); Public Law 95-486, Section 9(a) (28 U.S.C. 1337(a)). Nor does this concern the termination of an administrative or non-judicial power of a federal judge, such as the appointment of court officials or the District of Columbia School Board.

On the other hand, it is relatively certain that there would be no disagreement with the proposition that Congress could not, by statute, deprive a particular judge of his right to sit on any particular case or on any particular class of cases. Nor may Congress declare a judge appointed under Article III to be an Article I judge without the protection of Article III. Further, but perhaps less certain, Congress could not deprive certain class of judges of their right to sit. An Act, therefore, to deprive all judges appointed before, *e.g.*, January 20, 1960, or born

before January 1, 1910, of the right to sit *en banc*, would be a violation of Section 1 of Article III of the Constitution. Carpenter, *Judicial Tenure in the United States* (1918), 89-100. See 1 *Moore's Federal Practice* 52, note 18.

To the knowledge of counsel, Congress has not abolished the office of a judge since 1802, Act of April 29, 1802, Act of March 8, 1802, though it has abolished specific courts, *e.g.*, Circuit Courts, Act of March 3, 1911, 36 Stat. 1087, and the Commerce Court, Act of Oct. 22, 1913, 38 Stat. 208, 219, and specific aspects of courts, *e.g.*, Three Judge District Courts, Pub.L. 94-381, Sec. 1, 2, Aug. 12, 1976. Further, to the knowledge of this counsel, Congress has never before deprived an Article III Judge of his right to sit thereafter on an existing court or aspect of a court to which he was appointed. See *Marbury v. Madison*, 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803); *Stuart v. Laird*, 1 Cranch (U.S. 115, 2 L.Ed. 115 (1803). See also, Frankfurter & Landis, *The Business of the Supreme Court of the United States - A Study in the Federal Judicial System*, 38 Harv. L.Rev. 1005-1059, 39 Harv. L.Rev. 35-81 (1925); 39 Harv. L.Rev. 325-367, 587-627, 1046-1075 (1926); *Carpenter, supra*.

Congress has, in the past, enacted laws making it *permissible* for a judge *voluntarily* to relinquish certain of his powers by retiring from active to senior judge status. 28 U.S.C. 371. It has never before provided for the involuntary termination of any right or power of a federal judge. See 28 U.S.C. 372(b).

At the time of Judge Bryan's retirement, on October 17, 1972, an active judge did not surrender his right to sit *en banc* upon an appeal where he had sat on the original panel by retirement. Judge Bryan, therefore, cannot be

said to have voluntarily relinquished this right, albeit limited and contingent, to sit *en banc*.

This question takes upon itself importance beyond this particular case in the light of proposals before Congress to deprive any judge eligible for retirement (presently at ages 65 and 70, 28 U.S.C. 371(b)) of his or her right to sit *en banc* under any circumstance. Senate Report No. 95-117, page 52. See also Transcript of Hearings on Circuit Realignment, Part II, at pages 54 (Judge Gee), 124, 126, 132 (Chief Judge Chambers) and 168 (President of California Bar Association).

Further, litigants in the future will not pursue appeals grounded on the absence of a judge whose inclinations have not been articulated, or who might be embarrassed or offended by being made the point of contention. Only where the judge has, by mistake, heard the appeal *en banc* and held to his position will litigants prosecute the error of his exclusion from a subsequent *en banc*. This will happen rarely, but it did happen in this instance.

Congress may not constitutionally deprive an Article III Judge of any judicial power or function which other judges of the court to which he was appointed continue to exercise. This ought to be so declared by this Court.

II.

Congress did not intend to deprive a senior judge of the court of appeals of his power to sit *en banc* upon cases pending before the *en banc* court on October 20, 1978. Such an interpretation would conflict with the strong public policy concerning designation and assignment that a designation ordinarily "runs with the case". *United States v. Brooks*, 176 F.2d 482 (4th Cir. 1949); *Allan v. Johnson*, 391 F.2d 527, 532 (5th Cir. 1968). See 28 U.S.C.296, third paragraph.

The committee reports and legislative history suggest no such intent. In the only reference to the deletion of the third sentence of Section 46(c), found in any report or debate, the intent expressed was to prevent *en banc* courts from becoming so large as to be unworkable, a problem which would arise in the future and would not touch upon pending cases. Senate Report No. 95-117, page 52.

Indeed, in the debate on Public Law 95-486, Senator Kennedy, speaking as an author of the final version of the bill, expressed the opinion that neither active nor senior judges of a court of appeals could be lawfully deprived of his right to hear appeals from any geographical part of the circuit, 124 *Cong. Record*, 17, 517 (1978). If one of the leaders of Congress questioned their ability to rearrange the geographical aspects of the court, then they could hardly be presumed to have intended to deprive a judge of his right to hear a case then pending before him.

III.

The Court of Appeals substantially transgressed the proprieties of judicial action in recalling the mandate of the court, *sua sponte*, eight months after it issued and six months after the statutory period for review had expired (May 2, 1979). At some point every case must be considered final. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 523, 525-526 (1931); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973); *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965); 16 Wright, *Federal Practice and Procedure*, 281-282. To withdraw an opinion every time new judges are able to vote who may not have agreed with the original opinion makes a mockery of this concept.

This departure from accepted judicial process was exacerbated because the Recall of Mandate was not made upon a written Motion, as required by Rule 27 of the Federal Rules of Appellate Procedure, 9 *Moore's Federal Practice* 4404, but was done *sua sponte*. Counsel for the Petitioner can send no case in which Mandate was recalled except upon timely written motion. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1943); *Williams v. Conger*, 131 U.S. 390 (1887); *Peck v. Sanderson*, 59 U.S. 42 (1855); *Sibbald v. United States*, 37 U.S. 488 (1838); *Haney v. Chesapeake & Ohio R.R.*, 498 F.2d 987 (D.C. Cir. 1974); *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672 (9th Cir. 1973); *Powers v. Bethlehem Steel Corp.*, *supra*; *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 275 *et seq.* (D.C. Cir. 1971); *Legate v. Maloney*, *supra*; *Iverson v. Commissioner*, 257 F.2d 408 (8th Cir. 1958). Further, though a hearing was explicitly requested by the Petitioner, none was conducted. 9 *Moore's Federal Practice*, 4404, and n. 2.

Where previously this Court has entertained challenges to sitting judges, the issues have been raised during the normal course of review, not by the extraordinary means of recalling mandate after the time for review had expired. See *Glidden Company v. Zdanok*, 370 U.S. 537 (1962). Here the Respondents filed neither a motion for rehearing nor a petition for certiorari, and the time for filing both had expired.

Another and perhaps crucial element of this impropriety was the fact that the court delayed its consideration of the recall until after the appointment of two new judges, thereby changing the result. The original six judges in regular active service split evenly on the question of recall. Had the subject been considered at the time it was first brought before the court, in mid-June, 1979, or at the time before then,

the decision would have not been recalled. An evenly split court could have taken no action, and the February 2, 1979, decision would have endured. *McDowell v. United States*, 159 U.S. 596 (1895); *Ex Parte Ward*, 173 U.S. 452 (1899); *Cf. Glidden Company v. Zdanok*, *supra*.

If a decision may be withdrawn whenever the personnel of a court changes, then our government is indeed one of men, not laws.

CONCLUSION

For these reasons, the petitioners suggest that this case presents important questions for review which because of unique circumstances, will probably not hereafter be presented, and that a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit ought to issue in this proceeding.

Respectfully submitted, this _____ day of January, 1980.

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APPENDIX A

[Court of Appeals Letterhead Omitted]

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Re: 75-2276, Lawrence A. Uzzell, et al vs. William C. Friday, etc., et al

Dear Counsel:

Only recently we were informed that Section 5(a) of the Omnibus Judgeship Bill enacted last fall repealed the third sentence of 28 U.S.C. 46(c). That sentence is the one which authorized senior judges who previously had sat on a panel of the court before which the case was first heard to sit as a member of the *en banc* court. Since that sentence has been repealed, it now appears that Judge Bryan's participation in the case was unauthorized.

The court will welcome suggestions from counsel as to what should be done in the circumstance.

Sincerely yours,

WILLIAM K. SLATE, II

By /s/ Carol R. Lemon
(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:fls

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2276

Lawrence A. Uzzell, et al.,

Appellants,

v.

William C. Friday, et al.,

Appellees.

ORDER

It appearing to the court that, unknown to it and to counsel, when it sat on November 16, 1978, as an in banc court to hear argument of the above-entitled case, and

when on February 2, 1979, it decided said case, it was improperly constituted as an in banc court in the light of the repeal of the last sentence of 28 U.S.C. 46(c) by Pub. L. 95-486, 5(a), it is, with the concurrence of Chief Judge Haynsworth, Judge Butzner, Judge Murnaghan and Judge Sprouse, ORDERED that:

(1) The mandate heretofore issued be and it is hereby recalled.

(2) The opinion of February 2, 1979, be and it is hereby withdrawn.

(3) The case is returned to the hearing calendar for reargument before a properly constituted in banc court.

(4) The clerk shall fix a date for reargument as soon as an in banc court can be convened.

Judge Russell, Judge Widener and Judge Hall dissent from the entry of this order. Judge Phillips took no part in the consideration of this case or of this order.

/s/ Harrison L. Winter
Harrison L. Winter
United States Circuit Judge

79-1217

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 1729

LAWRENCE A. UZZELL and
ROBERT LANE ARRINGTON,
Individually, and upon behalf
of all other similarly situated, et al.,
Petitioners,

v.

WILLIAM C. FRIDAY, Individually
and as President of the University of
North Carolina, et al.,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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401 F.Supp. 775 (1975)

In The

UNITED STATES DISTRICT COURT

Middle District of North Carolina

Durham Division

No. C-74-178-D

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Plaintiffs,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, et al.,

Defendants,

and

Algenon L. MARBLEY, Chairman of the Black Student Movement and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Additional Defendants.

[776]

Hugh J. Beard, Jr., Charlotte, N.C., for plaintiffs.

Andrew A. Vanore, Jr., Deputy Atty. Gen., Raleigh, N.C., for defendants.

James V. Rowan, James B. Gillespie, Jr., and Karen Bethea Galloway, Durham, N.C., for additional defendants.

MEMORANDUM OPINION

GORDON, Chief Judge.

This case is before the Court on defendants' motion to dismiss or, alternatively, for summary judgment in an action brought by two students at the University of North Carolina at Chapel Hill challenging certain practices of the University and the Campus Governing Council (CGC) as violations of the Fourteenth Amendment and 42 U.S.C. §§ 1983 and 2000d. While there are twelve causes of action alleged, the plaintiffs in essence challenge three separate practices:

(1) The disbursement of funds collected from mandatory student fees to the Black Student Movement (BSM), a group composed exclusively of black students whose membership policies are allegedly discriminatory and whose purpose is allegedly the promotion of a separate racial and cultural identity;

(2) the provisions for minority representatives on the Campus Governing Council (CGC) authorizing appointment and membership solely upon the basis of race; and

(3) the provision for appointment to the Student Honor Court solely on the basis of race.

The plaintiffs allege this suit to be a class action and seek declaratory and injunctive relief.

The plaintiffs allege that each of the three above practices of the University are violations of 42 U.S.C. § 1983 in that they deny plaintiffs equal protection of the laws, and of 42 U.S.C. § 2000d in that the practices deprive the plaintiffs of full participation in and the equal benefit of the University, a "pro-

[777]

gram or activity receiving Federal financial assistance." The defendant University and the BSM, defendant-intervenors, move to dismiss or, in the alternative, for summary judgment, on the grounds that the claim concerning BSM subsidization should be dismissed as moot

or for lack of standing; that the claim concerning CGC representation be dismissed for lack of cause and controversy; and that the claim challenging honor court appointment be dismissed for lack of standing.[1] These issues will be resolved on the defendants' summary judgment motions since the Court will consider the many affidavits and answers to interrogatories in the record which are pertinent to the motions before the Court.

The issues before the Court raise questions of substantial difficulty which apparently have not been ruled on by other courts. The defenses of lack of standing and case and controversy make resolution particularly troublesome since they compel consideration of imprecise constitutional doctrines in a case involving claims of a largely unprecedented nature. As a result, this memorandum opinion, sailing an unchartered course, will inevitably pitch and toss in trying to steer between complex constitutional questions and unprecedented applications of § 1983 and § 2000d.

I.

The Court turns first to the issue of mootness with respect to plaintiff's claim concerning disbursements to the BSM. The BSM is an organization at the University "that recognizes the distinctly different cultural and historical evolution of the Black community vis-a-vis that of the broader society . . . " and whose goals are

1. The defendants also move to dimiss all claims for failure to exhaust administrative remedies and to dismiss the class aspect of the case for failure to satisfy Rule 23 requirements. The exhaustion argument cannot be seriously considered in light of McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975), certiorari granted Burrell v. McCray, ___ U.S. ___, 96 S.Ct. 264, 46 L.Ed.2d 249, and the class action argument need not be considered because of the resolution of the other motions.

"to strive for the continued existence of unity among all [BSM] members on this campus; offer outlets for expressing Black ideas and culture; and . . . to insure that . . . [BSM] members on the campus . . . never lose touch with the culture of the Black Community." (Preamble to the Constitution of the Black Student Movement.) From its inception in 1967 until September 1974, the membership policy of the BSM was limited to black students at the University. On September 18, 1974, the membership policy was amended to allow any student, regardless of race, to be a BSM member if the views of the applicant are consistent with the goals of the BSM as stated in the Preamble. (Art. III. A. Black Student Movement Constitution, Resolution of September 18, 1974.) At present, all the members of the BSM are black.

The defendants contend that the present nondiscriminatory membership policy and the intent of both the BSM officials and University officers, as evidenced by affidavits, ensure a non-exclusive membership policy and, thus, render this claim moot. At the hearing, the attorney for the BSM stated that the new membership policy is truly open and non-exclusive, that no one has ever been turned down for membership and that the purposes and goals of the BSM, while of course focused on the black experience at the University and black culture, are not inconsistent with integrated membership policies. Finally, the defendant University, while conceding that the mere cessation of the challenged illegal activity does not moot the challenge, argues that the University policy of prohibiting disbursement of stundent funds to a racially exclusive organization is so clear and its commitment to implementation of the policy so unequivocal that the case is moot since there is no possibility of a recurrence of the challenged activity.

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The plaintiff contends the controversy is not moot on several grounds, both factual and legal. Firstly, the plaintiff argues that the membership policy is still exclusive since the condition of membership requiring adherence to the preamble and the review of membership applications by a BSM membership committee allow for effective control of non-black membership and potential discrimination. The plaintiff argues that, in light of the past history of exclusive membership, the conditions for membership and the present all black membership amount to de facto exclusivity or raise at least a presumption of discrimination which should allow plaintiff's claim to withstand the mootness defense. Secondly, the plaintiffs assert that even if the BSM membership policies are no longer exclusive, the case should not be judged moot unless it is reasonably clear that the wrongful activity will not recur. In support of their position that there remains a cognizable danger of a recurrent violation, plaintiffs point to the funding of the BSM by student government with the approval of University officials for several years while the organization was racially exclusive. They point out that this funding was done with knowledge of the exclusivity and that the membership policy only changed after institution of this suit. They argue that the cessation of the activity and the declaration of intent not to reinstitute the policy is not sufficient to render this controversy moot.

The first determination on this issue is a factual one. The language of the new constitutional provision regarding BSM membership and particularly the language of the September 18 resolution manifests a clear intent to allow membership in the BSM on a non-discriminatory basis. Moreover, the affidavit of the Chairman of the BSM clearly expresses the membership policy of the BSM to be without regard for race. It is concluded that the BSM has changed

its membership policy from black exclusivity and discrimination against whites to a stated policy of open membership subject to the condition of adherence to the Preamble.

Careful consideration of the University and student government policies also discloses a change from a policy which apparently allowed the subsidization of racially discriminatory organizations to one which clearly prohibits such funding. The affidavit of Marcus Williams, the Student Body President, states the policy of Student Government to be that all student organizations must operate under an open membership policy without regard to race and declares the intent to terminate the funding with student fees of any organization violating that policy. This statement of policy is confirmed by the affidavit of the Treasurer of the Student Government and Dean Donald Boulton, the Dean of Student Affairs.

Furthermore, this policy of subsidizing only organizations whose membership is non-exclusive and open is mandated by The Revised North Carolina State Plan for the Further Elimination of Racial Duality in the Public Post-Secondary Education Systems adopted on May 31, 1974, by the Board of Governors of the University of North Carolina (see affidavit of John P. Kennedy, Jr.). These unambiguous promulgations of present University policy with regard to the subsidization of campus organizations and BSM policy as to membership compel the conclusion that the activity challenged by plaintiffs in their first, second, seventh and eighth claims for relief has ceased and that it is the clearly declared intent of the defendants and intervenors that it not be reinstituted.

This brings on for determination a legal question; that is, whether cessation of the challenged activity renders the controversy with respect to this challenged practice

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moot. While there is some dispute as to the proper standard for finding mootness when the defendant has discontinued the challenged acts, "the test of mootness is whether the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated." Wright, Miller & Cooper, *Federal Practice and Procedure*, Vol. 13, §§ 3533 t 282; *United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). As the commentators state, the prediction of possible recurrence of the challenged activity is often difficult and must to some degree depend on "individualized judgment and intuition." Wright, Miller & Cooper, at 282-83. However, in the area of official action, courts have been more receptive to declarations that abandoned illegal policies will not be reinstated particularly when, as in this case, the challenged policy is terminated altogether and not just its application in particular circumstances. Wright, Miller & Cooper, at 283-85, Cf. *Blackwell v. Thomas*, 476 F.2d 443, 445-46 (4th Cir. 1973).

The Court concludes that the clearly stated directives and policies of the University, filed with the Department of Health, Education and Welfare and acquiesced in by the student officials charged with their implementation, to terminate funding to any organization with discriminatory membership policies meets the burden of showing "no reasonable expectation" of recurrence.

[1] The apparent sincerity of all involved and the written promises or policies not to reinstitute the challenged activities along with the visibility of the defendants and their action preclude a serious danger that the challenged practices will be reinstituted. The Court shares plaintiffs' legitimate concern raised by the past subsidization of the BSM when its membership was exclusive. The Court strongly condemns the approving University officials and the student

government officials who, with apparent knowledge, for several years disbursed funds collected from mandatory student fees to an organization whose membership policy clearly excluded everyone except black students. However, the membership policy of the BSM has changed and the policy of the University has come full circle to an unequivocal refusal to fund any racially exclusive organization, perhaps as a result of this lawsuit as plaintiffs contend. For this reason, summary judgment is granted for defendants and defendant-intervenor, BSM, on the first, second, seventh and eighth claims for relief on the ground of mootness. The Court hastens to tell the plaintiffs and to admonish the defendants that if the University should intentionally or unintentionally again begin to fund any racially exclusive organization or should the BSM not be truly open to members of all races while it receives state funds,[2] the Court will not be reluctant to entertain this same lawsuit.

II.

The plaintiffs challenge the minority representation provision of the Student Constitution which requires that there be at least two blacks, two women and two men on the Campus Governing Council (and if this number is not elected, the President of the Student Body must appoint members of such race or sex to comply with the requirement). The defendants seek summary judgment on this

2. A truly open and non-exclusive membership policy requires more than a mere paper promise. The BSM must neither discourage, subtly or discretely, non-black membership in their organization nor may they use the condition of adherence to the BSM preamble to control non-black membership. There should be a presumption that all who seek membership are eligible to join and should be accepted. Any indication of discrimination by the BSM in its membership policies would be grounds for giving this lawsuit renewed vitality.

claim because of the undisputed fact that the provision has never been utilized since its enactment and, consequently, they argue there exists no case or controversy with respect to this claim.

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[2] The defendants' motion is granted for two reasons. The first is the one pressed by them that this provision has never been used and therefore no rights of the plaintiffs have been affected. This renders the claim hypothetical and the impact of any decision would have no direct effect on the status of the litigating parties.

However, there is a more fundamental reason for dismissing the claim for lack of case or controversy. The plaintiffs contend that 42 U.S.C. § 1983 and § 2000d guarantee them a right to attend a state university free from officially imposed or sanctioned discrimination and that a taxpayer or feepayer should not be compelled to subsidize a university which imposes or sanctions discrimination. They argue that these rights were violated at the moment the provision was adopted since, at that point, the defendants began using racial criteria in evaluating representation on the CGC. This argument, it is concluded, does not raise a case or controversy which is appropriate for resolution by this Court.

[3] In a strict sense, the claim fails to state a claim or controversy because the effect of this provision is in no way discriminating toward plaintiffs. The provision allows for the appointment of blacks, females *and males* to ensure representation on the CGC and while such a provision may be questioned as a matter of political values or constitutional principle, it cannot, even when implemented, be argued to have an injurious effect on the plaintiffs. *See* Wright, Miller & Cooper, § 3531 at 200. The plaintiffs contend that the existence of the provision

imposes a racial criteria in the evaluation of the members of the CGC but the Court is unable to perceive how that translates into a legal interest or cognizable injury to the plaintiffs which can form the basis of a claim raising a case or controversy suitable for adjudication.

On a less technical level, the Court feels summary judgment should be granted on this claim, not necessarily pursuant to any specific judicial doctrine, but because the claim does not warrant judicial review.[3] The Court adopts the following reasoning:

> "There is no reason to demand a final expression in terms of standing, ripeness, mootness, or political question doctrine, if the court is able to conclude that there is no sufficient need for deciding the issues tendered without relying on the frequently question-begging terminology of any single concept." Wright, Miller & Cooper, § 3529 at 153.

[4] It is the opinion of the Court that the issue raised by this claim is not appropriate for judicial relief and that the denial of judicial relief will cause no hardship to any party. Wright, Miller & Cooper, § 3259 at 141. It is felt that the challenge to the CGC provision is not appropriate for judicial relief because it would involve the Court in a purely policy determination, the resolution of which would have no effect on the status or welfare of the parties involved. The policy of CGC appointment deserves neither judicial approval or condemnation for, as it stands now, it does not affect the rights or interests of any student at the University to a degree which is traditionally susceptible of judicial remedy.

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3. The belief that the claim is not justiciable in a broad sense does not indicate conern about the decision to grant summary judgment on the more tangible case and controversy theory. It is felt that both grounds are equally convincing.

[5] Therefore, summary judgment is granted in favor of the defendants on the third, fourth, ninth and tenth claims for relief on the grounds that the claim challenging the CGC appointment provision does not state a claim or controver-

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sy and is not justiciable. The Court is aware of the fact that the area of justiciability and doctrines such as case and controversy, standing and mootness afford a court substantial discretion to refuse to review a case which it does not wish to entertain. However, the Court firmly believes that the issue raised in the third and fourth claims for relief is precisely the kind of matter for which the justiciability doctrine may be most appropriately invoked.

III.

The plaintiffs, in their fifth and sixth claims for relief, challenge the provision which allows for the appointment of members of the Student Honor Court on the basis of race. The Student Honor Court is a judicial body entrusted with trial and punishment powers in matters of student discipline. Its members are elected and appointed, but if requested by a defendant before the Honor Court, provision is made for racial or sexual representation which involves the appointment as court judges of four persons (out of a total of seven) of the defendant's race and/or sex.

The defendants contend plaintiffs lack standing to raise this challenge since they cannot demonstrate any injury resulting from these provisions. Adopting the standard set forth in *Association of Data Processing Serv. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that the interest sought to be protected by the claimant must be within the zone of interests protected by the statute or constitutional provision invoked, the defendants advocate dismissal on the grounds that plaintiffs cannot prove denial of equal protection which is the interest protected by 42 U.S.C. § 1983 and § 2000d.

The plaintiffs assert standing as students, taxpayers to the State, and fee-payers to the University, contending they should be allowed to attend a state-supported university free from officially imposed or sanctioned racial discrimination and not be compelled, as taxpayers and feepayers, to subsidize a racially discriminatory program or activity. Plaintiffs also cite recent United States Supreme Court cases to the effect that a person need have only a little stake in the outcome of the litigation to maintain a suit and that those who are not the direct objects of discrimination nonetheless may have standing to challenge discriminatory practices. *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 210, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972).

While the Court is inclined to agree with the plaintiffs on the standing issue because of the significant relaxation of the standing requirement in *SCRAP* and *Trafficante*, it is concluded that this challenge to the honor court provision should be dismissed for the reasons the claim concerning CGC representation was dismissed in Part II.

[6, 7] Firstly, the claim challenging honor court appointments does not state a case or controversy since the appointment provision does not discriminate against anyone. It may be invoked by all students, black and white, male and female, and while such a provision may be questioned on the grounds of political or social desirability or even judicial impartiality, it does not have the effect of discrimination. In the *Trafficante* case, the plaintiffs were not the objects of the alleged discrimination, but their challenge under the Fair Housing Act to the rental practices of the apartment in which they lived was found to present a case or controversy in that they did allege racial discrimination against others who sought housing in their unit. 409 U.S. at 211-12, 93 S.Ct. 364. The subject case is distinguishable, however, in that the practices challenged here do not discriminate against the plaintiffs or anyone else at the university. Therefore, while the Court would agree that plaintiffs have standing to challenge discriminatory practices imposed or sanctioned by the University, even if these practices do not directly or seriously affect them, this claim must be dismissed for failure to state a case or controversy.

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[8] Secondly, the Court feels this claim, similar to the challenge to CGC representation, is not justiciable since the issue is not appropriate for judicial review and the denial of review will not impose a hardship on any of the litigating parties. While the claim is a maverick in that it cannot be neatly classified as a political question, advisory litigation or a moot controversy, it does not raise issues for resolution which would have anything more than a very nominal impact on the rights or interests of the litigating parties. Judicial review of this claim would be more akin to an academic exercise than a substantial legal dispute. Therefore, summary judgment is granted in favor of the defendants on the fifth, sixth, eleventh and twelfth claims for relief on the grounds that the claims do not present a case or controversy and are not justiciable.

It is realized that the resolution of the CGC and honor court disputes in this manner, if upheld, effectively precludes the possibility that these practices can ever be ruled upon in a court of law. While the potential scope of 42 U.S.C. § 2000d is still uncertain[4] and the coverage of 42 U.S.C. § 1983 expanding, the Court is of the opinion that

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4. It is not clear to what extent Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d) will ultimately allow private parties to remedy discrimination or compel desegregation in federally funded activities. Antieau, **Federal Civil Rights Act**, § 138 at 182. An enumeration of practices which would violate 42 U.S.C. § 2000d, set forth by a leading commentator, arguably

the claims raised by the plaintiffs do not state a case or controversy even within the most liberal interpretation of those statutes.

Accordingly, a judgment will be entered.

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includes the CGC and honor court provisions challenged here in that they subject individuals to different treatment because of race. Antieau, § 137 at 181-82. However, the practices challenged here neither encourage discrimination nor discourage racial integration in any way and, therefore, do not, it is concluded, state a case or controversy under the most liberal reading of 42 U.S.C. § 2000d. Cf. Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

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547 F.2d 801 (1977)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

NO. 75-2276

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, et al.,

Appellees.

Argued June 10, 1976.

Decided Jan. 5, 1977.

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Hugh J. Beard, Jr., Charlotte, N.C., for appellants.

Andrew A. Vanore, Jr., Senior Deputy Atty. Gen., Raleigh, N.C., Karen Bethea Galloway, Durham, N.C. (James V. Rowan, Paul, Rowan & Galloway, Durham, N.C., Rufus L. Edmisten, Atty. Gen. of North Carolina, Raleigh, N.C., on brief), for appellees.

Before BRYAN, Senior Circuit Judge, WIDENER, Circuit Judge, and KUNZIG, Judge, United States Court of Claims.*

ALBERT V. BRYAN, Senior Circuit Judge:

In controversy in this appeal is the legality of the following practices at the University of North Carolina: (1) the continuance of an allotment to the Black Student Movement

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* Sitting by designation.

(BSM), a student organization, of a share in the mandatory Student Activities Fees required to be paid the institution on enrollment; (2) limitations based solely upon race on the appointment and membership of minority representatives in the Campus Governing Council; and (3) restrictions based exclusively on race for appointments to the Student Honor Court.

A suit to nullify these intramural practices was commenced on June 13, 1974 in the District Court by two current students, Lawrence A. Uzzell and Robert Lane Arrington, as a class action, naming as defendants William C. Friday, President of the University, its officers and its Board of Trustees, its officers and its Board of Trustees. The Chairman and Vice-President of the BSM were later added as defendants.

These practices were assailed as contravening the Fourteenth Amendment, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d.[1] As will appear more particularly *infra*, the general offensiveness ascribed to the usages is that they contemplate racial qualifications that cause the plaintiffs to suffer disadvantages at the University because they are not of the favored race. As this differentiation derives from the action of a State

1. "§ 1983. **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

"§ 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

agency[2]—the University—which admittedly receives Federal financial assistance in the form of grants and contracts, these detriments could constitute deprivations and discriminations condemned in the cited constitutional and statutory safeguards.[3]

Examining each of the practices in this light, we affirm the District Court's sum-

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mary judgment on defendants' motions as to financial support of the Black Student Movement but reverse the summary judgments as to minority representation on the Council and the Honor Court.[4]

[1] With the District Judge we see the plaintiffs as having standing to prosecute each of these claims. See *United States v. SCRAP*, 412 U.S. 669, 686-87, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). Moreover, his rejection of the defendants' motion to dismiss for plaintiffs' failure to exhaust State administrative remedies is accepted under the holding of *McCray v. Burrell*, 516 F.2d 357 (4 Cir. 1975), cert. dismissed as improvidently granted, 426 U.S. 471, 96 S.Ct. 2640, 48 L.Ed.2d 788 (1976).

Student Government

The President of the Student Body of the University is the chief executive officer of the student government. Since 1972, its legislative branch has taken the form of a Campus Governing Council (CGC) of 18 members. They

2. Arrington v. Taylor, 380 F.Supp. 1348 (MDNC 1974), aff'd in unpublished opinion (4 Cir. August 4, 1975) (No. 74-2080).

3. Jurisdiction is afforded here by 28 U.S.C. §§ 1331 and 1343 as the suit involves a Federal question and civil rights.

4. Our disposition of the case renders superfluous consideration of the appropriateness of the litigation as a class action. See footnotes 5 and 7 infra.

are elected annually by and from the student body and each student in good standing, like the plaintiffs, is eligible to vote in the election of its members. The judicial branch includes the Honor Court of the Student Body (SHC).

I. *Black Student Movement*

In 1967 a group of students formed the Black Student Movement to promote black culture and identity among black students. The organization was officially recognized by the University and was permitted to use the latter's facilities. It was also assigned office space in the Student Union Building. Since 1969, with the exception of the 1970-71 academic year, the BSM has received yearly appropriations —ranging from $6,400 to $12,000—from funds derived from the Student Activities Fees. The money thus provided has been used to support many programs of the organization, including cultural and entertainment events as well as publication of a newspaper, ***Black Ink***.

Upon its inception the BSM adopted a constitution stating that "Any Black student can be a member of the BSM." Similarly, as revised in 1971, it declared that "The members of the Black Student Movement shall be every Black student enrolled in the University of North Carolina at Chapel Hill." Now, through amendment in September 1974, the pertinent article provides that members of the BSM shall include any student whose views are consistent with the goals of the BSM. So, say the defendants, BSM membership is open to all students supporting its aims. Accordingly, the District Court held the plaintiffs' charges to be moot, dismissing them for that reason.

[2] The District Judge made fact findings that adequately underprop this holding: aside from the BSM's own curative rescission of the race qualification, the actions and representations of the defendants, including the University, are cited to demonstrate the absolute removal of the exclusivity of black membership. In denying relief, he concluded that the indications and probability for future reinstitution of the discrimination showed apprehension thereof too remote to warrant equitable measures. We are satisfied to affirm on these assurances of the District Judge. *Uzzell v. Friday*, 401 F.Supp. 775, 777-79 (MDNC 1975).[5]

II. *Campus Governing Council*

Plaintiffs challenge the Student Constitution's provisions for membership on the

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Council as violative of their civil rights in that it stipulates that the Council shall include "at least two Councillors of a minority race within the Student Body (if any), two male Councillors and two female Councillors". They further provide that, in the event an annual election does not produce such representation, "the President of the Student Body, with the consent of the Council, shall make the number of appointments necessary to ensure compliance with this section."

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5. Since we affirm the decision of the District Judge as to the BSM, we agree with him that consideration of the appropriateness of this aspect of the litigation as a class action is unnecessary. Our holding today is therefore limited to the named plaintiffs and does not affect the rights of other members of the alleged class. Nevertheless, we concur with the District Judge's admonition of defendants that "if the University should intentionally or unintentionally again begin to fund any racially exclusive organization or should the BSM not be truly open to members of all races while it receives state funds, the Court will not be reluctant to entertain this same law suit." 401 F. Supp. at 779.

The trial court dismissed for lack of the constitutional jurisdictional exaction—that there be an actual case or controversy—in this aspect of the plaintiffs' grievances. 401 F.Supp. at 779-81. First, it was noted that these organizational prescriptions of the CGC had never been activated and that consequently "no rights of the plaintiffs have been affected". Again, the Court on this theme concluded that these features of the CGC were "in no way discriminating toward plaintiffs" for they ensure representation on the CGC to all classes—blacks, women and males. As an overall reason, however, the Court felt "'there is no sufficient need for deciding the issues . . .' Wright, Miller & Cooper, §3529 at 153". 401 F.Supp. at 780.

[3] We cannot affirm the dismissal, but rather find that plaintiffs stated a justiciable cause of action. We reverse now on the plain and simple ground that, without either reasonable basis or compelling interest, the composition of the Council is formulated on the basis of race. This form of constituency blatantly fouls the letter and the spirit of both the Civil Rights Acts and the Fourteenth Amendment. A reading of them, particularly Section 2000d, is all that is needed for authentication of this conclusion. See footnote 1, *supra*. Additionally, see: *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S. Ct. 2574, 49 L.Ed.2d 493 (1976); *Lige v. Town of Montclair*, 72 M.J. 5, 367 A.2d 833 (1976) (No. A-107); *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

III. *Student Honor Court*

[4] Since October 2, 1974 an accused has been permitted to request that four of the seven judges on the trial

bench of an Honor Court be of his or her race or, in the alternative, of his or her sex.[6]

Plaintiffs' challenge to this article of student government was dismissed by the District Judge upon the same grounds as he struck down the present provisions for CGC composition—lack of case or controversy. 401 F.Supp. at 781-82. For the same reasons as we disagreed there with the District Court's judgment we do so here: the selection of the SHC panel is related to race with no reasonable or compelling nexus to that classification.

[5] In summary we affirm the decision of the District Court as to the finding of

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the Black Student Movement but reverse the District Court's grant of summary judgment as to the composition

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6. The University's Instrument of Student Judicial Governance of 1974 provides, in pertinent part:

"e. Trial Courts

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2) If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:

a) At least four of the seven members of the trial court shall be of the same sex as the defendant;

b) When a defendant is not a member of the majority race, at least four of the seven members of the trial court shall not be of the majority race;

c) When a defendant is a member of the majority race, at least four of the seven members of the trial court shall be of the majority race.

3) Each trial court shall be selected by the Court Administrator under the procedures described below.

(Continued on next page)

of the Council and the Honor Court.[7] Although the plaintiffs did not move either this Court or the District Court to grant summary judgment in their favor, we clearly have power to do so. Appellees' briefs contain nothing to suggest that we should not follow that course of action if we determine to reverse and, while the affidavits are in conflict on some points, none of these inconsistencies has dispositive significance in the view we take of the case.[8]

Accordingly, we think it is "just under the circumstances" for this Court to remand with directions that the District Court enter summary judgment for the plaintiffs. *Morgan Guaranty Trust Co. v. Martin*, 466 F.2d 593, 600 (7 Cir. 1972), *quoting* 28 U.S.C. §2106.

Affirmed in part, reversed in part, and remanded with directions.

(6. Continued)

* * *

d) If the defendant has requested racial or sexual representation on the trial court, the members of the trial court shall be selected by random drawing from the pool of the entire court panel of a number not to exceed that which will permit the sexual or racial representation requested; and by random drawing from another pool appropriate to insure that representation."

7. Although we are inclined to the view that the CGC and SHC aspects of this litigation could appropriately go forward as a class action under FRCP 23(a) and (b), **see Potts v. Flax**, 313 F.2d 284, 289 (5 Cir. 1963), it is not necessary to reach the class action issue.

"By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. [While the decree] . . . might name the successful plaintiff as the party not to be discriminated against, . . . that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race [or sex] against others." **Id.** (citation omitted). Thus any error in determination of the appropriateness of class action here would be harmless since the decree for all practical purposes would be the same whether entered on behalf of the alleged class or confined to named plaintiffs. **Id.** at 289-90.

8. **Compare Abrams v. Occidental Petroleum Corp.**, 450 F.2d 157, 165-66 (2 Cir. 1971), **aff'd sub nom. Kearn County Land Co. v. Occidental**

(Continued on next page)

(8. Continued)

Petroleum Corp., 411 U.S. 582, 93 S.Ct. 1736, 36 L.Ed.2d 503 (1973) and **Morgan Guaranty Trust Co. v. Martin**, 466 F.2d 593, 599-600 (7 Cir. 1972) with **Fountain v. Filson**, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971 (1949) **and Kern County Land Co. v. Occidental Petroleum Corp.**, 411 U.S. at 605, 614-17, 93 S.Ct. 1736 (Douglas, J., dissenting); **see** 6 Moore's Federal Practice 56.27[2], 56.12.

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558 F.2d 727 (1977)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

NO. 75-2276

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, Ferebee Taylor, Individually and as Chancellor, Claiborne Jones, Individually and as Vice-Chancellor, Marcus Williams, President of Student Body, Timothy Dugan, Individually and Treasurer, etc., Board of Trustees of the University of North Carolina at Chapel Hill, and Board of Governors of the University of North Carolina, and Algenon L. Marbley, Chairman of the Black Student Movement, and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Appellees.

Argued June 8, 1977.

Decided July 28, 1977.

Hugh J. Beard, Jr., Charlotte, N.C., for appellants.

Andrew A. Vanore, Jr., Senior Deputy Atty. Gen., Raleigh, N.C. (Rufus L. Edmisten, Atty. Gen., North Carolina, Raleigh, N.C., on brief), for appellees.

Karen Bethea Galloway, James V. Rowan, Paul, Rowan & Galloway, Durham, N.C., on brief for defendant-intervenors.

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, BUTZNER, RUSSELL, WIDENER and HALL, Circuit Judges.

OPINION ON REHEARING IN BANC

ALBERT V. BRYAN, Senior Circuit Judge:

Upon rehearing in banc, the opinion heretofore filed in this appeal, 547 F.2d 801 (4 Cir. 1977), is confirmed with two additions:

(1) A statement will be included in Section II of the opinion, as it appeared in the first order denying a panel rehearing, viz, that after the decision of the District Court but before this appeal came on for argument the Student Constitution provision for appointment by the President of the Student Body, with the consent of the Campus Governing Council, of up to two members of the minority race as Councillors, in the event that the annual election had secured Council office for fewer than two such members, had been invoked and satisfied by appointment of a black student as a Councillor.

(2) To the citations at 547 F.2d at 803, line 10, will be added that of *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 329, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970), for the point that plaintiffs herein have standing to sue.

The Clerk is now directed to enter an order affirming the panel decision, 547 F.2d at 801, subject to the additions noted above, and reversing and remanding the judgment of the District Court consistent with that decision.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, concurring and dissenting:

I would affirm the order of the district court in its entirety, for the reasons sufficiently stated in the district court's opinion. *Uzzell v. Friday*, 401 F.S. 775 (M.D. N.C. 1975).

I.

I agree with the majority that the district court cannot be faulted for concluding that the issue of university funding of the Black Student Movement is moot.

As to the issue of the validity of the university regulations which allow the student body president to appoint two black members to the Campus Governing Council if two have not been elected, I think that plaintiffs lack standing to sue because there is no actual or threatened injury to them.

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They have not been threatened with loss of representation as whites. They have not been denied the right to vote; nor has the weight of their vote been diluted. They have not been denied the right to seek election and to win. The fact that potential black appointees may cast the deciding vote on a close issue before the Council, in derogation of plaintiffs' interests, is too remote and speculative for serious consideration.

Finally, as to the issue of the validity of the regulation permitting an accused before the Honor Court to request that a majority of the judges reflect his race and sex (white, black, male, or female), I think that plaintiffs have failed to establish standing to sue and have failed to show a case or controversy, i.e. an actual dispute reflecting competing interests. This regulation does not discriminate; *any* student may request majority representation of that student's race and sex. Surely a non-offender, of a race or

sex different from the accused, has no right or privilege to insist that the accused be judged by less than the peers of the accused. Conversely in a geographical area where racial discrimination has been known, the university has an interest in the appearance of justice, as well as justice in fact.

II.

On the merits of the case, I and some of my brothers are outvoted. This is understandable, but what is totally inexplicable is that the majority rushes to final judgment without affording the defendants either their rights under Rule 56, F.R.Civ.P., or elemental procedural due process of law.

When defendants moved for summary judgment, they did so on the grounds that plaintiffs' claims were moot, that plaintiffs' claims failed to establish a case or controversy, that plaintiffs had failed to exhaust their administrative remedies and that the plaintiffs lacked standing to sue. Defendants did not assert that on the merits they were entitled to *summary* judgment and plaintiffs made no such claim either. Indeed, even before us, plaintiffs ask only that we vacate the judgment of the district court "and remand this case for trial upon the merits."

Of course, in a proper case, a trial court may render a summary judgment *against* a party who has moved for summary judgment in his favor, even though the opposing party, to whom summary judgment is granted, did not file a cross motion. And I do not dispute that an appellate court, in a proper case, may do the same thing. But this is not a proper case in which the power we possess should be exercised.

In the record before us, there was some general discovery by way of requests for admissions, answers to interrogatories and production of documents, but I do not read them to tell the whole story of the history of discrimination or non-discrimination at the university, the need for remedial measures, the reasonableness of the measures and how, in practice, they have operated. I think that these are all factors bearing on the ultimate merits. Certainly the parties, as well as the district court, did not and do not treat the record as complete for purposes of final adjudication on the merits. Even if the majority thinks otherwise, I suggest that in the sensitive, expanding area of the law of racial discrimination, the majority should recognize that it is not unlikely that the majority's view of the merits may not be the final say and that in equity and good conscience, the parties should be given the opportunity to make the record on which they must stand or fall.

Until it reached us, the case was litigated and decided on procedural or preliminary grounds not dispositive of the merits. By converting the case into a final adjudication on the merits when neither party contemplated or requested it and when neither party has had the opportunity to present any additional relevant proof, the majority denies to the losing party, as well as the party prevailing, the very rights that we have assiduously preserved for uncounseled litigants in summary judgment actions. *Roseboro v. Garrison*, 528 F.2d 309 (4 Cir. 1975)—fair notice and an opportunity to respond. The majority thus violates Rule 56 and denies procedural due process of law. Surely the parties, including the State of North Carolina, deserve fairer treatment.

From the majority's partial reversal, I respectfully dissent.

---

591 F.2d 997 (1979)

In The

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

NO. 75-2276

Lawrence A. UZZELL and Robert Lane Arrington, Individually, and upon behalf of all others similarly situated,

Appellants,

v.

William C. FRIDAY, Individually, and as President of the University of North Carolina, Ferebee Taylor, Individually and as Chancellor, Claiborne Jones, Individually and as Vice-Chancellor, Marcus Williams, President of Student Body, Timothy Dugan, Individually and Treasurer, etc., Board of Trustees of the University of North Carolina at Chapel Hill, and Board of Governors of the University of North Carolina, and Algenon L. Marbley, Chairman of the Black Student Movement, and Robert L. Wynn, II, Vice-Chairman of Black Student Movement,

Appellees.

Argued Nov. 16, 1978.

Decided Feb. 2, 1979.

Hugh J. Beard, Jr., Charlotte, N.C., for appellants.

J. LeVonne Chambers, Charlotte, N.C. (Charles Becton, James C. Fuller, Jr., Chambers, Stein, Ferguson & Becton, P.A., Charlotte, N.C., Karen Galloway, Durham, N.C., Jack Greenberg, James M. Nabrit, III, Napoleon B. Williams,

Jr., Judith Reed, New York City, on brief), Elizabeth C. Bunting, Asst. Atty. Gen., Raleigh, N.C. (Rufus L. Edmisten, Atty. Gen. of North Carolina and Andrew A. Vanore, Jr., Senior Deputy Atty. Gen., Raleigh, N.C., on brief), for appellees.

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WIN-

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TER, BUTZNER, RUSSELL, WIDENER and HALL, Circuit Judges.

ALBERT V. BRYAN, Senior Circuit Judge:

Obedient to the remittitur of the Supreme Court in vacating our judgment,[1] this court has given the case "further consideration in light of *Regents of* [*the*] *University of California v. Bakke*, 438 U.S. 265 [98 S.Ct. 2733, 57 L.Ed.2d 750] (1978)."[2] To be reexamined is the conclusion of invalidity laid, in the suit of appellant-white students, to two of the regulations and practices approved and effectuated by the University of North Carolina in its student government.

The first regulation in issue pertains to the legislative branch, the Campus Governing Council (CGC), elected annually by the student body. The CGC is composed of 18 members, but must include "at least two Councillors of a minority race within the Student Body (if any), two male Councillors and two female Councillors."[3] If the election does not satisfy this contingency, then the President of the

1. **Uzzell v. Friday**, 558 F.2d 727 (4th Cir. 1977); **Uzzell v. Friday**, 547 F.2d 801 (4th Cir. 1977).

2. 438 U.S. 912, 98 S.Ct. 3139, 57 L.Ed.2d 1158 (1978).

3. University of North Carolina Student Constitution art. I, § 1.D.

Council (the president of the student body) shall make appointments from the students generally to fulfill this requisite.

The second questioned requirement relates to the composition of the judicial branch of the government, the Honor Court of the Student Body. Abbreviated, this latter provision stipulates that an accused, on request, is entitled to have four of the seven judges of the court of his or her race or sex.[4]

Appellants charge that these regulations and practices, in relying *exclusively* on a racial criterion, deny them their Fourteenth Amendment rights of equal protection, and violate the Civil Rights Act of 1871 and Title VI of the Civil Rights Act of 1964.[5]

Bakke, we recognize, unequivocally pronounces that in State educational institutions race may be a consideration in fixing the rights of students, but at no stage did the

4. The Instrument of Judicial Governance for the University of North Carolina at Chapel Hill art. IV, § E(2)(e)(2) reads as follows:

e. Trial Courts

• • •

2) If requested by the defendant, provision shall be made for racial or sexual representation (but not both) on the trial court, as follows:

a) At least four of the seven members of the trial court shall be of the same sex as the defendant;

b) When a defendant is not a member of the majority race, at least four of the seven members of the trial court shall not be of the majority race;

c) When a defendant is a member of the majority race, at least four of the seven members of the trial court shall be of the majority race.

5. U.S. Const. amend. XIV, § 1; Civil Rights Act of 1871, codified at 42 U.S.C. § 1983 (1970); and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Court affirm that race could be the sole determinant in any such adjustment. 438 U.S. 265, 98 S.Ct. 2733. As Mr. Justice Powell put it for the majority:

> When a classification denies an individual opportunities or benefits enjoyed by others *solely* because of his race or ethnic background, it must be regarded as suspect. (Accent added.)

Id. at 305, 98 S.Ct. at 2756.

I.

[1] The permeating defect in the organization of CGC, the governing council, is the imposition of an artificial racial structure upon this elective body that bars non-minority students from eligibility for appointment to the Council. This resort to race affronts *Bakke*. Although the regulation in question seeks to provide "protective representation," its effect is to establish a racial classification, as it relies exclusively on race to preclude non-minority students from enjoying opportunities and benefits available to others. *See id.* 265, 98 S.Ct. 2733.

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Aggravation of the incursion upon appellant white students' rights becomes immediately apparent upon recalling that the CGC President picks additional minority students to satisfy the requisite racial composition without an election. Appellants are ineligible for appointment to the Council because they are not of a minority race. Furthermore, the presence of one or more unelected members on the Council dilutes the representative character of the legislative body. Students are entitled to the assurance that their legislative, established at a State institution, is entirely free from the taint of

racial preference. Disenfranchisement because of race entrenches upon their Constitutional and statutory rights. *Supra* note 5.

In *Bakke*, Justice Powell reiterated "that in 'order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.'" (Citations omitted.) 438 U.S. at 305, 98 S.Ct. at 2756. Inclusion in the CGC of unelected Councillors is not indispensable to assure representation of minority students. As noted in *Bakke*:

> Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. . . . [P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.

Id. at 298, 98 S.Ct. at 2753.

II.

[2] The Honor Court is, of course, for the trial of students accused of conduct dishonorable or otherwise hurtful to the student body, as well as to other pupils individually. It is in the nature of an intramural judicial tribunal of seven lay jurors or judges. Its organic regulation allows race to be a dominant consideration in impaneling the court, obviously a vital juncture in the trial process. This focus on race is achieved by permitting

the defendant to insist that a majority of his triers be of his race. That such recourse to race would be a preposterous defiance of the Fourteenth Amendment and the Civil Rights Acts, *supra*, note 5, in a trial beyond the University walls needs no exposition. Its denial of equal protection within the academic community is no less clear, for there race may be invoked in a trial adjudging the character of a student.

Extending the choice of his judges' racial complexion to a student on trial for misconduct is a potential invasion both of the rights of the other students singly and as a body. They need the protection afforded by the court to prevent any injury to them which the particular defendant's offense might cause. The non-offenders' confidence in the Honor Court logically is diminished when they know that by regulation race may influence the court's judgment. Their position can be likened to the public's in a criminal prosecution, where the prosecution, like the defendant, is entitled to a jury not drawn with an eye to race.

The stern, sincere and unanimous desire for fairness, both in truth and in theory, cannot override the stubborn fact that the system adopted by the University perpetuates inequity instead, thus infringing upon the interests of all students. The just solution is to remove race altogether from the high court regulation, as the appellants pray. Otherwise, it will bar them of the assurances of equal treatment under the Constitution and laws of the United States. *Supra* note 5.

III.

There is no justification for appellees' insistence that the cause be remanded to the District Court to take additional evidence that, they assert, reflects prior discrimination at the University, or depicts the regulations as an effort by the University to develop a "diverse student body" or to

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achieve other related aims. *Bakke* suggests that racial preferences may be approved upon the finding of a continuing Constitutional or statutory violation, as long as others are not prejudiced by the remedial course adopted. 438 U.S. 265, 98 S.Ct. 2733. The method here chosen for eradicating possible earlier discrimination could not be accepted, even if history revealed such conduct, because, as we have seen, the supposedly remedial measures presently enforced impinge upon the rights of others.

Conclusion

Finally, the University of North Carolina has failed to demonstrate that the accomplishment of the State's purpose necessitates its use of a suspect classification in the two student government regulations before us. Accordingly, summary judgment will go for the appellants, holding the regulations invalid, and, to that extent, reversing the judgment of the District Court.

Reversed with Summary Judgment.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, dissenting:

Because we think that faithful compliance with the mandate to reconsider this case in the light of ***Regents of University of California v. Bakke***, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), requires a remand to the district court for the taking of evidence and for findings

of fact, we respectfully dissent. Additionally, we think that on remand the district court should make a determination as to whether the case is moot.

I.

The majority, on an incomplete record as we shall show, invalidates two regulations. The first requires that the 18-member Campus Governing Council have "a protective representation of minority races and both sexes by being composed of at least two members of a minority race within the student body, two male members and two female members. If, as a result of student elections, these minimum requirements are not met, the president of the student body, with the consent of the council, shall appoint additional members, who have the same rights, privileges and duties as elected members, to satisfy the formula. From the present record, it appears that it has never been necessary that the power of appointment be exercised to meet the minimum requirements of minority racial representation.

The second is a guarantee that an accused required to appear before an Honor Court may, on his request, require that four of the seven judges of the Court be of his or her race or sex. It should be noted that this regulation is facially neutral both as to race and as to sex; the right to have a majority of the judges of the same race and sex as the accused extends to a student of either sex and of any race.

As we pointed out in our earlier dissent, the record before us contains some general discovery by way of requests for admissions, answers to interrogatories and production of documents. 558 F.2d at 728. But these disclosures fall well short of telling the whole story of the history of discrimination or non-discrimination at the university, the need for remedial measures, the reasonableness of the

measures and how, in practice, they have operated. Short of such proof and findings of fact derived therefore, we do not think that this case can be properly decided.

Bakke does not hold that in all events racial criteria may not be the sole determinant in fixing the rights of students. True, *Bakke* recognizes that race is a suspect classification, but the significance of the classification is, as Mr. Justice Powell for the Court explains, only that the State, in order to sustain the validity of its use of the criterion, "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." 438 U.S. at 305, 98 S.Ct. at 2756 (quoting from *In re Griffiths*, 413 U.S. 717, 722-23, 93 S.Ct. 2851, 37

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L.Ed.2d 910 (1973)). Having reaffirmed that general principle, Mr. Justice Powell added, "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." 438 U.S. at 307, 98 S.Ct. at 2757.* Of course, Mr. Justice Powell continued, the Court "has never approved a classification that aids persons perceived as members of relatively victimized

*After the mandate of the Supreme Court issued in the instant case, the University moved for a remand to the district court for a trial on the merits. After pointing out that the present record is not full and complete, the university tracked the language quoted in the text asking that it "be afforded an opportunity to present evidence of its "legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.'" Indeed, it rightfully argued that procedural due process required that it be given this opportunity.

groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 307, 98 S.Ct. at 2757. But, "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial since the legal rights of the victims must be vindicated." 438 U.S. at 307, 98 S.Ct. at 2758.

Contra to the views of the majority, we read *Bakke* both to recognize and to approve, as a general principle, the use of racial criteria in remedial steps to redress wrongs worked by adjudicated instances of racial discrimination, provided only that the remedial steps "work the least harm possible to other innocent persons competing for the benefit." 438 U.S. at 308, 98 S.Ct. at 2758. That is the very reason why we think this case should be remanded and a full trial conducted. The present record simply does not permit a firm conclusion as to the extent of discrimination at the University of North Carolina and the need for and efficacy of the present regulations. The majority's condemnation of the regulations because they impinge upon the rights of others is simplistic. *Bakke* teaches that as a necessary remedial measure a victimized group may be preferred at the expense of other innocent persons. What cries out for determination in the instant case is whether such preferment is justified under the principles of *Bakke*.

II.

This litigation began on June 13, 1974 by plaintiffs then students at the University. They were joined by other students who sought to intervene on September 13, 1974, and whose intervention was allowed. Although the com-

plaint sought certification for a class action, the district court did not act upon the request. Additional interventions were sought from us, and on April 18, 1978, we referred the motions to the district court. The present record does not disclose what action the district court took thereon.

The fact that even with scholastic success the period that a student is enrolled in a University is limited and the fact that, absent certification of a class, there have been repeated efforts to intervene in the litigation suggest to us the possibility that the litigation has become moot. Thus, it is quite possible that the action may have been mooted by the departure of all named plaintiffs from the University before other students sought intervention. If, in accord with our views, the case were remanded for trial on the merits, we would direct the district court first to consider if the case has become moot either because all named plaintiffs have severed their connection with the University, or at some stage of the proceedings no named plaintiff had maintained a continuing connection with the University.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1217

LAWRENCE A. UZZELL, et al.,
Petitioners,

v.

WILLIAM C. FRIDAY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1217

LAWRENCE A. UZZELL, et al.,
Petitioners,

v.

WILLIAM C. FRIDAY, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents respectfully pray that a Writ of Certiorari to review the order of the United States Court of Appeals for the Fourth Circuit entered in this case on November 9, 1979 be denied.

OPINIONS BELOW

The order of the Court of Appeals for the Fourth Circuit from which the Petition arises was entered on November 9, 1979 and to Respondents' knowledge has not been reported. Prior to that order, the Court of Appeals upon remand entered an opinion on February 2, 1979. This opinion is reported at 591 F. 2d 997 (1979). The order of the United States Supreme Court directing remand is reported at 438 U.S. 912, 57 L. Ed. 2d 1158, 98 S. Ct. 3139 (1978). The remand was ordered after respondents petitioned this Court for Certiorari and the basis of the remand was reconsideration in light of the decision in BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978). The original decision of the Court of Appeals is reported at 547 F. 2d 801 (1977); following a petition for rehearing *en banc* that Court issued an *en banc* decision on July 28, 1977. This latter decision is reported at 558 F. 2d 727 (1977). The opinion of the District Court for the Middle District of North Carolina is reported at 401 F. Supp. 775 (1975).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. 1254(1). For reasons which appear

below, respondents contest this invocation. We believe this case is not in an appropriate posture for the exercise of this Court's jurisdiction.

QUESTIONS PRESENTED

1. WHETHER CONGRESS HAS DEPRIVED A SENIOR JUDGE OF THE COURT OF APPEALS OF POWER RETAINED BY HIM UPON HIS RETIREMENT TO SIT *EN BANC* UPON CASES THERETOFORE HEARD ON A PANEL.

2. WHETHER THE RECALL OF MANDATE AFTER NINE MONTHS AND AFTER THE APPOINTMENT OF TWO NEW JUDGES DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 1 of the Constitution of the United States provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

Section 5 of Public Law 95-486, 95th Congress, October 20, 1978, 92 Stat. 1629, provides:

"Section 5. (a) Section 46(c) of Title 28 of the United States Code is amended—(1) in the first sentence, by striking out 'division' and inserting 'panel' in lieu thereof; and
(2) by striking out the third sentence."

28 U.S.C. §46(c), prior to October 20, 1978, provided:

"(c) Cases and controversies shall be heard and determined by a Court or division of not more than three judges, unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court *en banc* shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court *en banc* in the rehearing of a case or controversy if he sat in the court of division at the original hearing thereof."

STATEMENT OF THE CASE

This case presents a rather unusual procedural pattern. It began when petitioners filed a complaint in the United States District Court for the Middle District of North Carolina on June 15, 1974. The attack was based on rules and regulations adopted by the student government at the University of North Carolina at Chapel Hill and the alleged violations involved the Fourteenth Amendment and various provisions of the

Civil Rights Acts. Shortly thereafter respondents moved for summary judgment; on September 17, 1975, their motion was granted. (See Supplemental Appendix, pg. 1-A.)

The petitioners appealed and on January 5, 1977, the Court of Appeals for the Fourth Circuit affirmed the decision of the trial court in part, but reversed the summary judgment on two issues and ordered that summary judgment be entered for petitioners on these claims. (See Supplemental Appendix, pg. 15-A) Respondents moved for a rehearing, but this was denied in an order filed on February 28, 1977. Although the mandate was issued, the Court recalled its decision *sua sponte* on March 21, 1977.

Thereafter, hearing before the Court of Appeals *en banc* was scheduled. On this occasion Judges Haynsworth, Winter, Butzner, Russell, Widener, Hall and Senior Judge Bryan comprised the *en banc* court. On July 28, 1977, in a 4 to 3 decision, the Court of Appeals affirmed the decision of the original panel, subject to certain additions. Judges Winter, Haynsworth and Butzner dissented. (See Supplement Appendix, pg. 24-A.)

Respondents then filed a petition for a Writ of Certiorari to this Court, challenging both procedural and substantive issues inherent in the Fourth Circuit decision. In an Order filed on July 3, 1978, this Court granted the Writ, vacated the *en banc* decision and remanded the action to the Court of Appeals. 438 U.S. 912. Reconsideration in light of BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA v. BAKKE, 438 U.S. 265 (1978) was requested.

While this case was on remand to the Fourth Circuit, Congress enacted Public Law 95-486 on October 20, 1978. This law amended 28 U.S.C. §46(c), the statute governing the assignment of judges for hearings before the Court of Appeals. The amendment in effect limited the composition of *en banc* hearings to those Circuit judges in regular active service. Permissive language allowing senior and retired judges to sit on these hearings was deleted.

Unaware of the passage of this amendment, the Fourth Circuit scheduled a rehearing after remand for November 16, 1978. The same judges who previously sat on the *en banc* hearing again convened to hear the case. This group included Judge Bryan, a Senior Circuit Judge. Following this rehearing, the Court again split 4 to 3 in reaffirming the *en banc* decision previously entered. (See Supplemental Appendix, pg. 29-A.)

On May 31, 1979, the Court of Appeals through the office of its clerk, informed counsel for all parties that Public Law 95-486 had been effective on the date of the rehearing *en banc* and thus that Judge Bryan's participation was not authorized. (See Appendix A to Petition.) The Court invited counsel to suggest resolutions to the problem and responses were received from counsel for all parties. On November 9, 1979, by Order of the Court, the mandate was recalled and the decision of the *en banc* Court was withdrawn. (See Appendix B to Petition.) The case was then set for rehearing in an expedited fashion and on January 7, 1980, the case was fully argued by all parties before a properly constituted *en banc* Court.

REASONS FOR DENYING THE WRIT

1. Because the rehearing by the Fourth Circuit, which is under attack here, has already been scheduled and held, the issues petitioners seek to raise are now moot. There is no live controversy for this Court to entertain and the petition should therefore be denied.

2. Petitioners seek to bring before the Court an interlocutory matter which is neither final nor otherwise appropriate for review. No decision has yet been rendered by the Fourth Circuit and no reasons have been tendered for avoiding an orderly appellate process. The well-established policy against piece-meal appeals and review of non-final orders calls for a rejection of the Petition for Writ of Certiorari here.

3. Congress clearly had the power to regulate the assignment of judges for the Courts of Appeals and the Fourth Circuit certainly was obligated to follow the Congressional mandate. In meeting its obligations, the Fourth Circuit had authority to reconstitute one of its own hearings, such that it would be properly authorized to hear the case before it. Even if this Court substantively reviews the Petition, the lack of merit therein calls for its denial.

ARGUMENT

I.

Petitioners attack the action of the Fourth Circuit Court of Appeals in recalling their mandate in this case and ordering a new *en banc* hearing. What petitioners

fail to mention is that this hearing not only has been called, it also has been held. On January 7, 1980, all parties in this case appeared before the Fourth Circuit *en banc* and presented their arguments in full. At no time between the notification that recall and reargument were being considered and the hearing itself did petitioners seek to stay that Court's action or petition either the Fourth Circuit or this Court to review the questions presented now.

Because the reconstitution of the Court of Appeals and the subsequent hearing have already been accomplished, respondents believe that no live controvesy is presented by the Petition. We, therefore, respectfully suggest that the issues raised there are moot and that this Court has no actual case before it for review.

Federal courts do not possess the power to decide questions that cannot affect the litigants in the case before them. See NORTH CAROLINA v. RICE, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971). Article III of the United States Constitution limits the jurisdiction of these Courts to actual or live cases or controversies. See PREISER v. NEWKIRK, 422 U.S. 395, 45 L. Ed. 2d 272, 95 S. Ct. 2330 (1975); DEFUNIS v. ODEGAARD, 416 U.S. 312, 40 L. Ed. 2d 164, 95 S. Ct. 1704 (1974). Unless a substantial controversy exists between parties having adverse and immediate legal interests, the Court has nothing but a hypothetical question before it. To answer such an inquiry would be tantamount to an advisory opinion, an extension of jurisdiction not permitted by Article III. See MARYLAND CASUALTY CO. v. PACIFIC CO., 312

U.S. 270, 85 L. Ed. 826, 61 S. Ct. 510 (1941); NORTH CAROLINA v. RICE, *supra*. Finally, the *possibility* that the issues raised may at some later point affect the litigants does not render the case justiciable. Unless and until a true dispute surfaces, no jurisdiction exists. See PREISER v. NEWKIRK, *supra*.

In the case at bar, the Fourth Circuit has already held the hearing which petitioners now seek to stop. Thus, the issues they raise cannot possibly affect the litigants now and no immediate and actual controversy is alive at this time. The possibility that the composition of the Fourth Circuit at this hearing may affect the parties in the future is speculative at best; it cannot be argued that any present dispute exists and mere possibilities and speculations do not confer Article III jurisdiction.

The fact that an actual case is not present here undermines the validity of petitioners' request for review. Because the issues raised appear to be moot, we respectfully request that the Petition be denied.

II.

There has to date been no final determination on the merits of this case. Nor are there issues presented here which parallel the grant or denial of injunctive relief which on occasion enjoy immediate appellate review. Instead, petitioners present a purely interlocutory matter which does not directly affect the rights of any party. To allow this Petition, then, would completely subvert the normal appellate process.

Federal appellate jurisdiction generally depends on the existence of a decision that concludes the litigation on the merits and leaves nothing for the court to do but execute the judgment. COOPERS & LYBRAND v. LIVESAY, 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978); CATLIN v. UNITED STATES, 324 U.S. 229, 89 L. Ed. 911, 65 S. Ct. 63 (1945). Where an order of the court does not extend or deny final relief but simply moves the case towards trial or other disposition, it is interlocutory and not appealable. See SWITZERLAND CHEESE ASS'N v. HORNE'S MARKET, 385 U.S. 23, 17 L.Ed. 2d 23, 87 S. Ct. 193 (1966).

If these requirements of finality are not followed, orderly judicial procedures completely break down. The trial process is disrupted, the course of litigation is substantially delayed and unnecessary multiple appeals become the order of the day. See COOPERS & LYBRAND v. LIVESAY, *supra;* EISEN v. CARLISLE & JACQUELIN, 417 U.S. 156, 40 L. Ed. 2d 732, 94 S. Ct. 2140 (1974). There are then important judicial interests militating strongly against piece-meal review.

There are, of course, limited exceptions to the finality requirement. Where injunctive relief is granted or denied, such orders may be appealable. 28 U.S.C. §1292(a) (1); see also LIBERTY MUTUAL INS. CO. v. WETZEL, 424 U.S. 737, 47 L. Ed. 2d 435, 96 S. Ct. 1202 (1976). And where a distinct part of a controversy is settled conclusively and could not be reviewed effectively on appeal from the final judgment, interlocutory review has been permitted. This exception, however, is only applicable in a "small class" of

decisions. See COOPERS & LYBRAND v. LIVESAY, *supra.* Thus, in the vast majority of cases, the finality requirement applies; review of procedural and interlocutory court rulings must await a decision of the entire case on the merits.

The Petition at bar is an excellent example of the piece-meal appeal eschewed by the finality rules. No decision on the merits has been reached and final relief has neither been granted nor denied. Injunctive orders are not at issue and all questions presented here will be appealable following a final judgment. Thus, the exceptions to the finality requirements are not applicable here. The effect of the Fourth Circuit's orders was simply to move the case *towards* final disposition, not to conclusively settle any party's claims. In this posture, we believe the Petition is nothing more than a request for piece-meal review, an invitation that this Court has consistently declined.

Finally, we should point out that even petitioners recognize that the review sought here is most unusual. On page 11 of their Petition, they candidly state that challenges to a court's composition are generally raised during the normal course of review. Petitioners should be held to their assertion.

Well settled principles of appellate procedure command that all questions involved in a case await final judgment before they may be presented for review. Those principles ring particularly true where, as here, an appeal would completely disrupt and delay the final disposition of this case. Because no reasons have been

cited which would support such an upheavel, we respectfully ask this Court to avoid this result; petitioners' invitation should be declined.

III.

Even if this Court disregards the two jurisdictional mandates discussed above, there is yet further reason for denying the Petition in this case. Our argument here is that petitioners have not raised questions which are either susbstantive or supported by legal principles or precedent. In short, both the amendment of the statute and the action of the Fourth Circuit Court of Appeals were valid and constitutional.

As noted above, petitioners initially challenge the authority of Congress to exclude Senior Circuit Judges from *en banc* courts, as it did in the amendment to 28 U.S.C. §46(c). In contrast, we are convinced that Congress had ample power to do exactly what it did.

Article III of the United States Constitution describes the judicial power of the Supreme Court, but specifically reserves the establishment of lower federal courts to Congress. That assembly was not constitutionally required to create inferior courts; nor was it required to invest them with all judicial powers. See PALMORE v. UNITED STATES, 411 U.S. 389, 36 L. Ed. 2d 342, 93 S. Ct. 1670 (1973). Jurisdiction of these courts depends entirely upon Congressional action; that body may grant limited, concurrent or exclusive jurisdiction or withold jurisdiction altogether. The degree and character of the jurisdiction is dependent upon what

Congress deems to be proper for the public good. See LOCKERTY v. PHILLIPS, 319 U.S. 182, 87 L. Ed. 1339, 63 S. Ct. 1019 (1943).

In exercising this power, Congress may also prescribe or regulate the modes of process and procedure. And this authority embraces the whole case and every transaction in it from commencement to termination, until the judgment is satisfied. See LIVINGSTON v. STORY, 34 U.S. 632, 9 L. Ed. 255, 9 Pet. 632 (1835); WAYMAN v. SOUTHARD, 23 U.S. 1, 6 L. Ed. 253, 10 Wheat. 1 (1825).

Also included within the Congressional discretion is the power to declare remedies and other relief in particular classes of cases and to designate specific courts for certain causes of action. See ALLEN v. STATE BOARD OF ELECTIONS, 393 U.S. 544, 22 L. Ed. 2d 1, 89 S. Ct. 819 (1969). Further, Article III's delegation to Congress extends to the withdrawal of jurisdiction and this revocation is proper even where cases are pending before the lower federal courts. See GLIDDEN CO. v. ZDANOK, 370 U.S. 530, 8 L. Ed. 2d 671, 82 S. Ct. 1459 (1962).

The GLIDDEN case is particularly instructive here for it too concerned the appointment and designation of federal judges. The challenge there was to an act of Congress giving the Supreme Court authority to assign Courts of Claims judges to sit on Circuit Court panels. This Court held without reservation that Congress indeed had the power to provide for the designation and assignment of judges and that this power was encompassed in Article III.

Turning back to the amendment in question here, we believe it certain that Congress had the power to designate the configuration of *en banc* Circuit Courts. This action was nothing more than a regulation of the procedures to be followed in the appellate court. This proscription is well within the Article III grant to Congress. See WAYMAN v. SOUTHARD, *supra.* Certainly, if Congress can grant or deny jurisdiction entirely it can regulate the size or composition of a particular class of courts. See PALMORE v. UNITED STATE, *supra.*[1]

More precisely on point, GLIDDEN v. ZDANOK, *supra,* bestows validity on the amendment to 28 U.S.C. §46(c). Congress has discretionary authority to designate and assign judges to particular courts and this was all the amendment in question here purported to do. Petitioners attack on the statutory amendment must be initially and completely rejected. The provision for the composition of *en banc* courts is both valid and constitutional.

Turning to petitioners other attack, that the Fourth Circuit had no authority to withdraw mandate and order a new hearing, this challenge too suffers from a lack of merit. If Congress has ordered a certain composition of *en banc* courts, the Fourth Circuit was

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[1]Petitioners' argument that the tenure and compensation provisions of Article III in some way preclude the amendment to 28 U.S.C. 46(c) enjoys no support. These provisions protect the judiciary from arbitrary removal or financial attack. See ATKINS v. UNITED STATES, 556 F. 2d 1028 (Ct. Claims 1977). They do not confer jurisdiction on any particular category of judges.

obligated to follow that proscription. Since that Court did nothing other than what it was ordered to do, a short answer to petitioners' attack is that no invalid or unauthorized action occurred. Without such a showing, the Petition may be dismissed on its face.

The Fourth Circuit action, however, is supported by independent grounds as well. The appellate courts have inherent powers to effectuate procedures ensuring that a court's jurisdiction is correctly exercised. See TEXACO, INC. v. CHANDLER, 354 F. 2d 655 (10th Cir. 1965). Moreover, because the actions here of recall and rehearing are similar to the issuance of perogative writs, the All Writs Act, 28 U.S.C. §1651(a), gave the Fourth Circuit the authority to proceed as it did.

The All Writs Act provides that federal courts may issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). It is a legislative source of procedural instruments to be used as aids in the performance of judicial duties necessary to achieve the ends of justice. See UNITED STATES v. NEW YORK TELEPHONE CO., 434 U.S. 159, 54 L. Ed. 2d 376, 98 S. Ct. 364 (1977). The act itself has been given a flexible interpretation in order that the Courts may issue such writs whenever necessary to prevent the frustration of a court order or the proper administration of justice. See for example, FEDERAL TRADE COMMISSION v. DEAN FOODS CO., 384 U.S. 597, 16 L. Ed. 2d 802, 86 S. Ct. 1738 (1966).

The power conferred by the Act extends to the protection of the appellate courts, preventing the diminution of their jurisdiction and even protecting potential appellate jurisdiction where an appeal is not then pending. See ROCHE v. EVAPORTED MILK ASS'N., 319 U.S. 21, 87 L. Ed. 1185, 63 S. Ct. 938 (1943). Where the issuance of a writ is contemplated, the following factors may be considered by the courts: whether the matter is in the public interest; whether the issuance would affect the policy against piece-meal appeals; and whether legislative authority has been disregarded. See UNITED STATES ALKALI EXPORT ASS'N. v. UNITED STATES, 325 U.S. 196, 89 L. Ed. 1554, 65 S. Ct. 1120 (1945). The clearer the lack of jurisdiction, the more appropriate the issuance of the writ. See EX PARTE CHICAGO ROCK ISLAND v. PACIFIC RY. CO., 255 U.S. 273, 65 L. Ed. 631, 41 S. Ct. 288 (1921); MORROW v. DISTRICT OF COLUMBIA, 417 F. 2d 728 (D.C. Cir. 1969).

In the case at bar these principles carry substantial weight. The Circuit Court discovered that a hearing had been conducted before an unauthorized court, thus heavily undermining its jurisdiction. To rectify the invalidity, the Fourth Circuit simply formed a proper court and called for a new hearing. We believe the court had inherent power to act as it did in order to preserve the integrity of its decisions. Beyond that the All Writs Act provided a power of authority for nullifying the unauthorized proceeding. As an aid to its appellate jurisdiction, jurisdiction which is not contested, the Court certainly had authority to constitute a proper court having jurisdiction over the case. See UNITED STATES v. NEW YORK TELEPHONE Co., *supra.*

Moreover, because legislative authorizations of jurisdiction had been disregarded in the conduction of the former hearing, the necessary elements for issuance of a writ were clearly present. As this Court recognized in EX PARTE CHICAGO ROCK ISLAND v. PACIFIC RY. CO., *supra,* where jurisdiction is lacking, a writ is entirely appropriate. Because the first Fourth Circuit hearing was without jurisdictional foundation, the Court's action was entirely proper.

Should this Court review the Petition substantively, we believe the weakness in the arguments presented will become apparent. Congress clearly had power to call for a certain category of judges to comprise *en banc* courts. When the Fourth Circuit acted to prevent a violation of this statutory mandate, it also had authority for its actions. No unconstitutionality or other invalidity in these procedures has been established and this omission calls for denial of petitioners' request.

CONCLUSION

Important jurisdictional principles of mootness and finality are applicable and controlling in this case. Initially the Petition for Writ of Certiorari may be denied on these grounds. If the substance of the Petition is scrutinized, there are yet other reasons for declining petitioners' invitation. Neither error nor impropriety has been shown and this failure deprives the Petition of all validity. On any one or more of these grounds, respondents request that the writ be denied.

Respectfully submitted, this 24th day of April, 1980.

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT were served upon:

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This the 24th day of April, 1980.

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79-1217

Supreme Court, U. S.
FILED
APR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 1729

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similarly situated, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, Individually and as President of the University of North Carolina.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 1729

==========

LAWRENCE A. UZZELL and ROBERT LANE ARRINGTON, Individually, and upon behalf of all others similarly situated, et al.,

Petitioners,

v.

WILLIAM C. FRIDAY, Individually and as President of the University of North Carolina.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The district court's opinion is reported at 401 F. Supp. 775. The Fourth Circuit's opinions are reported at 547 F.2d 801, 558 F.2d 727, and 591 F.2d 997. These opinions are set forth in petitioners' Supplemental Appendix to Petition for Writ of Certiorari. This Court's previous opinion in this case is reported at 438 U.S. 912.

Statement of the Case

Solely for the purpose of this Brief in Opposition, intervening respondents accept the Statement of the Case presented in the Petition for Writ of Certiorari.

Argument

REASONS FOR DENYING THE WRIT

Petitioners present in their petition for a writ of certiorari the following three reasons for granting the writ:

1. To determine whether Congress has the power to deprive a senior judge of the Court of Appeals of the power to sit en banc;

2. To determine whether Congress has the power to deprive a senior judge of the Court of Appeals of the power to sit en banc with respect to a case pending before the en banc court on or before October 20, 1978; and

3. To determine whether a United States Court of Appeals is empowered to allow reargument on a case after the time for petitioning for reargument and the time for petitioning for a writ of certiorari have expired.

Respondents, intervening defendants below, oppose the granting of the writ. They submit that each of these issues has previously been determined by this Court and that they therefore do not present any issues of public importance. In addition, respondents oppose the granting of the writ for the reason that the order sought to be reviewed is an interlocutory decree that fails to satisfy this Court's stated criteria for the discretionary review of interlocutory orders of the Courts of Appeals. For these reasons, respondents request that the petition be denied.

I.

THE ORDER BELOW IS AN INTERLOCUTORY DECREE WHICH SHOULD NOT BE REVIEWED AT THIS TIME

The order of the Fourth Circuit below, dated November 9, 1979, said that the court's previous mandate in this case was recalled, that its opinion dated February 2, 1979, was withdrawn, that the case was returned to the hearing calendar for reargument before a properly constituted en banc court, and that the clerk was directed to fix a date for reargument as soon as an en banc court could be convened. Following this determinination by the Fourth Circuit, plaintiffs filed their petition for a writ of certiorari to review the order of November 9, 1979 of the Fourth Circuit.

Pursuant to the November 9, 1979 order of the Fourth Circuit, the clerk duly notified the parties herein that reargument before the court was scheduled for January 7, 1980. On that date, the parties appeared for reargument before an en banc court properly constituted under the Omnibus Judgeship Bill, 28 U.S.C § 46(c). Decision on the case was reserved and has not yet been announced by the en banc court.

In the absence of special circumstances, this Court has refused to review, upon petition for a writ of certiorari, interlocutory orders of the courts of appeals. Such orders have been considered as "not yet ripe for review by this Court". Brotherhood of Locomotive Firemen and Enginemen v. Bangor Aroostook Railroad Company, 389 U.S. 327, 328 (1967). As this Court stated in Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916), "except in extraordinary cases, the writ is not issued until final decree." See also American Construction Co. v. Jacksonville, T. & K. W. Ry Co., 148 U.S. 372, 378 (1893); The Three Friends, 166 U.S. 1, 49 (1897); The Conqueror, 166 U.S. 110, 113 (1897); Denver v. New York Trust Co., 229 U.S. 123, 133 (1913). Moreover, the Court has noted that the inter-

locutory nature of a decree by a court of appeals is "a fact that of itself alone furnishe(s) sufficient ground for the denial of the application" for a writ of certiorari. Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., supra, 240 U.S at 258.

Under the rules of this Court, interlocutory decrees are reviewed only if "it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause", American Construction Co. v. Jacksonville, T & K. W. Ry. Co., supra, 148 U.S. 384, or to decide important, unresolved legal issues of great public moment that are basic to continued litigation of the case, see, e.g., Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n.3 (1949). Failure to grant the writ, however, wil not cause any special embarrassment or inconvenience to the parties in the conduct of this case. Nor does the petition present any substantial, unresolved issues of law. Hence, respondents submit, there are no substantial reasons warranting immediate reivew of the interlocutory order issued by the court below.

The Fourth Circuit's order is interlocutory in the purest sense of the word. It did no more

than direct the parties to reargue the case. Petitioners were free to make upon reargument before the Fourth Circuit whatever arguments they intend to present to this Court. Moreover, the Fourth Circuit is bound to consider, while the case is pending before it, any and all applicable legal principles. See Huddleston v. Dwyer, 322 U.S. 232, 236-37 (1944). Accordingly, respondents contend that this Court should, in the present instance, follow its "normal practice of denying interlocutory review". Estelle v. Gamble, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). After the Fourth Circuit has had an opportunity to render its decision, petitioners will then have ample time and opportunity to petition this Court for a writ of certiorari if they deem it either necessary or desirable.

II.

WHETHER CONGRESS CAN PRECLUDE A JUDGE OF SENIOR STATUS FROM SITTING EN BANC IS AN ISSUE WHICH HAS BEEN PREVIOUSLY DETERMINED BY THIS COURT.

This Court has examined in a variety of different contexts the question of the power of the judges of the Courts of Appeals to hear and determine cases en banc and the question of the rights of litigants with respsect to en banc

hearings. The issues were explored at great length in Textile Mills Securities Corp. v. Commissioner of Internal Revenue, 314 U..S 326 (1943) and Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247 (1953).

More recently, the subject came up for review in United States v. American-Foreign Steamship Corp., 363 U.S. 684 (1960). This was a suit by the Steamship Company against the United States to recover amounts of alleged excessive charter hire assessed by the Maritime Commission with respect to ships chartered by the Steamship Company from the United States. The action was dismissed by the district court. The United States Court of Appeals for the Second Circuit affirmed. Circuit Judge Harold Medina sat on the panel. On December 19, 1957, the Second Circuit granted the Steamship Company's petition for rehearing en banc and ordered that "argument thereon be confined to written briefs to be submitted within twenty days." Id., 363 U.S. at 686. Thereafter, on March 1, 1958, Judge Medina retired and assumed senior status. Approximately, five months later, on July 28, 1958, the court rendered an en banc decision in which Circuit Judge Medina participated. Because 28 U.S.C. § 46(c) then pro-

vided that a "court en banc shall consist of all active circuit judges of the circuit", judge Clark dissented.

The United States petitioned for another rehearing en banc. The petition was denied on the ground that

> (s)ince Judge Medina was a member of the court en banc which was duly constituted to hear and determine the issues raised by the petition for rehearing, we think his subsequent retirement did not affect his competence to participate in the decision thereafter reached.

265 F.2d 136, 154. Judge Clark and one other judge dissented. They held that Judge Medina's participation in the en banc determination was barred by the plain language of the statute. This Court granted certiorari to consider the issue which had been raised by judge Medina's participation in the en banc hearing.

In its decision, this Court noted that the "view that a retired circuit judge is eligible to participate in an en banc decision thus finds support neither in the language of the controlling statute nor in the circumstances of its enactment". United States v. American-Foreign Steamship Corp., supra, 363 U.S. at 689. Quoting judge Clark in the opinion below, this Court said, "the

evident policy of the statute was to provide 'that the active circuit judges shall determine the major doctrinal trends of the future for their court.'" Id., at 690. In language that is dispositive of the issues which petitioners request this Court to review, this Court said.

> Persuasive arguments could be advanced that an exception should be made to permit a retired circuit judge to participate in en banc determination of cases where, as here, he took part in the original three-judge hearing, or where, as here, he had not yet retired when the en banc hearing was originally ordered. Indeed, the Judicial Conference of the United States has approved suggested legislative changes that would provide such an exception, and a bill to amend the statute has been introduced in the Congress. But this only serves to emphasize that if the statute is to be changed, it is for Congress, not for us, to change it.
>
> We conclude for these reasons that under existing legislation a retired circuit judge is without power to participate in an en banc Court of Appeals determination, and accordingly that the judgment must be set aside.

Id., at 690-691.

The issues which petitioners seek to present to this Court in their petiion for writ of certiorari are thus identical to those resoved in

United States v. American-Foreign Steamship Corp., supra. In their petition, the petitioners recite that prior to the time of this Court's previous grant of certiorari in this case, Senior Circuit Judge Bryan participated in an en banc hearing of this case, that following the remand by this Court, 438 U.S. 912, to consider the issues herein in light of Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the Congress amended 28 U.S.C. § 46(c) to provide for the exclusion of senior judges from participation in en banc hearings, that thereafter argument before another en banc court of the Fourth Circuit was scheduled, and that judge Bryan again participated in the en banc hearing. There is nothing in this recitation of facts which differs in any substantial way from the facts in American Foreign Steamship Corp., other than that in the present case, unlike the latter, the Court of Appeals recognized its mistake and sought to correct it by recalling its mandate and withdrawing its opinion rather than rely upon the parties to seek a reversal pursuant to a writ of certiorari.

In bringing this petition, petitioners have not only failed to examine the applicable precedents of this Court but they have also failed to pay heed to this Court's admonition that "§ 46(c) is not addresssed to litigants. It is addressed to the Court of Appeals." Western Pacific Railroad Corporation v. Western Pacific Company, supra, 345 U.S. at 250. In that opinion, this Court explicitly stated that § 46(c) "deals, not with rights, but with power", Id. at 259, and noted that "Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." Id. at 259.

In the past, senior circuit judges were denied the privilege of sitting en banc, see United States v. American-Foreign Steamship Corp., supra; Western Pacific Railroad Corp. v. Western Pacific Railroad Co., supra; United States v. Sentinel Fire Ins. Co., 178 F.2d 217, 239 (5th Cir. 1949)(dissenting opinions of judges Holmes and McCord). Recently, however, they were able to exercise the privilege for a brief period of time. See Moody v. Albemarle Paper Co., 417 U.S. 622 (1974). This is no longer possible since the amendment of 28 U.S.C. § 46(c) by Congress on October 20, 1978. The denial of this privilege is not unconstitutional. This was the

holdings in this Court's decisions in United States v. American-Foreign Steamship Corporation, supra, and Moody v. Albemarle Paper Co. supra.

Moreover, the constitutionality of Congress' powers to enact statutes providing for the conduct of business by inferior federal courts created by it was examined at great length by Justice Harlan in his concurring opinion in Chandler v. Judicial Council, 398 U.S. 74, 95-126 (1970). Also, this Court said in United States v. American-Foreign Steamship Corp., supra, that "Congress may well have thought that it would frustrate a basic purpose of the legislation not to confine the power of en banc decision to the permanent active membership of a Court of Appeals." 363 U.S. at 689. Congress' exclusion of senior judges from en banc hearings is logically related to and commensurate with the Congressional purpose of permitting each Court of Appeals "to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions...." Id. 363 U.S. 689-690. This purpose is legitimate and can be constitutionally effectuated by § 46(c).

III.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT HAD THE POWER AND DUTY TO CORRECT ITS FAILURE TO COMPLY WITH § 46(c) AND TO GRANT REARGUMENT.

Petitioners' arguments in support of their petition for a writ of certiorari are ultimately based upon a claim that the Fourth Circuit was disabled, once it discovered its noncompliance with 28 U.S.C. § 46(c), from correcting its mistake and ordering reargument simply because the time for respondents to petition either for rehearing or for a writ of certiorari had expired. Such a rule, however, has nothing to commend it. If followed, it would cause grave damage to the ability of a Court of Appeals to "maintain its integrity as an institution", United States v. American-Foreign Steamship Corp., supra, 363 U.S. at 689.

Furthermore, this Court has stated, that in

> "reocgnizing the value of an efficient use of the en banc power, the court should adopt such means as will determine whether the court's administration of the power is achieving the full purpose of the statute so that the court will better be able to change its en banc procedure, should it deem change advisable."

Western Pacific Railroad Corp. v. Western Pacific Co., supra, 345 U.S. at 261.

More specifically, petitioners' claim is contrary to a century of precedents of this Court and the lower federal courts. As early as 1882, this Court announced that

> It is a general rule of the law, that all the judgments, decrees or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the Term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court.

Bronson v. Schulten, 104 U.S. 410, 415 (1882). The power to revise the judgment, however, did not exist once the term had expired except by a "writ of error coram vobis...allowed to bring before the same court in wich the error was committed some matter of fact which had escaped attention, and which was material in the proceeding." Id. at 416.

The issue came before the Court again in 1944 in Huddleston v. Dwyer, 322 U.S. 232 (1944). In Huddleston, petitioners sought a second rehearing in the Second Circuit six months after entry of a previous judgment. The request was based upon an

intervenig state court decision which was rendered after the time for rehearing had passed. The Second Circuit denied the request. The Supreme Court vacated the decision of the Second Circuit. It held that "until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decisions of the highest state court." 322 U.S. at 236.

In 1970, a case similar to Huddleston came again before the Second Circuit. In a panel consisting of judges Friendly, Hays, and Kaufman, the Second Circuit, taking cognizance of the earlier decision by the Supreme Court in Huddleston, said

> It seems clear to us that we have the power to enlarge the time to petition for rehearing, F.R.A.P. 26(b), 40, and to modify an erroneous decision although the time for rehearing may have expired....
>
> This Circuit has long shown considerable willingness to correct what it believed an erroneous interpretation of the law....
>
> Even more telling was the Court's action in Huddleston v. Dwyer... where it vacated a Court of Appeals decision for failing to consider a new state court opinion that... was handed down after the time for rehearing had expired... Instead of reversing the court of appeals ... the Supreme Court there vacted the court of appeals decision, and

> remanded to that court to permit it to determine the issues of state law in the first instance ... For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petiton for certiorari has been filed would be, it seems to us, wasteful, for under the Huddleston procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider...

Braniff Airways, Inc. v. Curtiss-Wright Corp., 424 F.2d 427, 429-430 (2d Cir. 1970).

The only cases in which this Court has denied either itself or a lower federal court the power to revise its judgment beyond the time period specified for rehearing have been federal income tax cases where there exists a federal statute which specifically prescribes the time period after which a judgment is final and beyond the power of a court to revise. See R. Simpson & Co. v. Commissioner of Internal Revenue, 321 U.S. 226, 227-230 (1944). No such statute exists in this case and none is suggested by petitioners.

These considerations show that the Court of Appeals below had sufficient authority and reason to revise the earlier judment which had been

rendered by it in violation of explicit federal statutory law and to schedule thereafter the case anew for reargument. In exercising this power, the Court of Appeals did no more than its duty. Certainly, it did not exceed the powers granted to it by law. Nor did it do anything different from that which district courts do when they set aside a judgment pursuant to Rule 60(b) of the Fed. R. Civ. P. or allow an independent action to set aside a judgment. See Pickford v. Talbot, 225 U.S. 651 (1912). The cases cited herein show that the issues upon which petitioners request this Court to grant certiorari are issues wich have long been settled by this Court and which therefor do not need to be reviewed upon cerriorari. Accordingly, respondents contend that the petition should be denied so that the Fourth Circuit can decide the merits of this case in light of the decision in Bakke, surpa, as previously ordered by this Court. 438 U.S. 912.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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